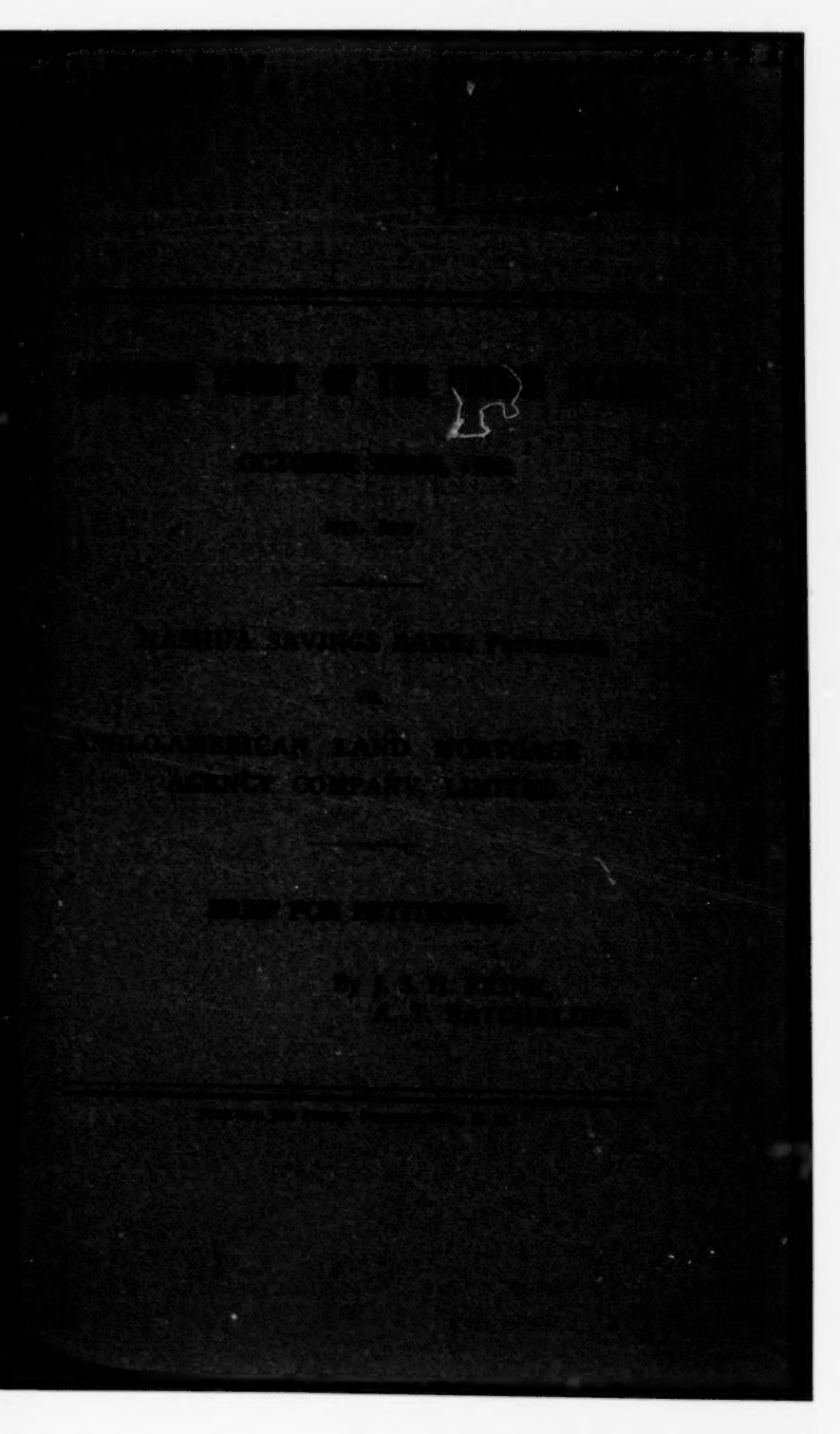

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902. No. 167

NASHUA SAVINGS BANK, PETITIONER,

vs.

ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, LIMITED.

STATEMENT OF CASE.

The petitioner is a New Hampshire Corporation. The respondent is an alien corporation, organized under the Companies act of Great Britain.

This is an action of assumpsit, brought in the Circuit Court for the district of New Hampshire, at the August term, 1896, by the respondent against this petitioner, to recover the amount of certain calls or assessments on stock in the respondent company, owned by the petitioner. The declaration is given on page 3 of the Record.

The defendant's plea was the general issue, with a brief statement of defense (Record p. 6.)

The case was tried at the May term, 1898, before the Hon. William L. Putnam, Circuit Judge, and a jury. The trial proceeded under the third count of the declaration (*Record p. 5*) as amended (*Record p. 9*) The plaintiff introduced certain evidence given in the *Record pp. 10-25.*

At the close of all the evidence Judge Putnam directed the jury to return a verdict for the plaintiff, (*Record p.* 32) which it did, assessing damages against this petitioner in the amount of $6,858.67.

On Oct. 29, 1898, a bill of exceptions was allowed, and on April 24, 1901, in the Circuit Court of Appeals by a majority opinion, the judgment of the Circuit Court was approved by Judges Colt and Brown, Judge Aldrich dissenting.

Record pp. 60-80. 108 *Fed.* 764.

By exceptions duly taken, the defendant raised, among others, the following questions :—

(1) Whether the statutes of Great Britain have been duly proved.

(2) Whether the allegations of the third count of the declaration are sufficient to state a cause of action.

(3) Whether there is any presumption of authority and regularity in favor of the acts and proceedings of a foreign corporation.

(4) Whether the New Hampshire decisions that the sole remedy is by forfeiture of the shares of stock, are binding on the Federal Court.

(5) Whether a verdict should not have been directed for the defendant for lack of evidence.

(6) Whether the action should not have been debt and not assumpsit.

PROOF OF STATUTES OF GREAT BRITAIN.

The plaintiff below claimed that the call was made in pursuance of the British Statutes, as appears by the declaration and record. The materiality of the proof of these

statutes must be conceded. We desire, therefore, to raise the preliminary question as to the sufficiency of the mode of proof adopted in this case by the original plaintiff.

In order to prove these statutes the plaintiff introduced the deposition of one Frederick H. Ramsden. The purpose of this proof appears on page 13 of the Record. Mr. Powell :

"The purpose of offering this proof is to show that we have a right of incorporation and are incorporated, and the other reason is, that the foreign statutes prescribe the liability and the rights of the stockholders."

That the testimony of Ramsden was the sole proof of statutes appears upon page 23 of the Record, and by Judge Putnam's ruling at the foot of page 35 of the Record, where he assumes that these statutes are proved by the testimony of Ramsden.

On page 47 of the Record appears under assignment of errors this exception :—

"The Circuit Court erred in admitting against the seasonable objection and exception of the (original) defendant the statutes of Great Britain, without the statutes being duly authenticated."

On page 14 of the Record will be found the ground for the exceptions to the proof of these statutes. It was that they were not proved according to the established rules of law ; because they were not authenticated under the seal of Great Britain, or by the testimony of any person who had compared them with the original enrollment ; nor by the certificate of any officer authorized to make such certificate.

It is elementary law that the statutes of Great Britain are facts, of which this court does not take cognizance without proof.

Liverpool G. W. Steam Co. v. Insurance Co., 129 *U. S.* 445.

The ordinary modes of proof are :—(1) By exemplification under great seal. (2) By certificate of an officer having authority to make it. (3) By testimony from comparison with original enrollment.

Church v. Hubbart, 2 *Cranch* 187, 238.
Emery v. Berry, 28 *N. H.*, 485.

The distinction between proof of written and unwritten foreign law is recognized in Emery v. Berry. The Circuit Court recognized the modes of proof, as above suggested, as the appropriate ones, but held that the strict rule had been relaxed in New Hampshire in

Hall v. Costello, 48 *N. H.*, 176.

It is true the mode of proving the laws of Canada, in that case, was not in strict conformity to the formal rules adopted in Emery v. Berry, but it was not relaxed sufficiently to admit the statutes of Great Britain as proven here.

Distinction Between Mode of Proof Adopted in Hall v. Costello, and in Case at Bar.

The syllabus covers what was done in Hall v. Costello. It is in these words :

"In proof of the laws of a foreign country, the testimony of any person, whether a professional lawyer or not, who appears to be well informed on the point, is competent."

In conformity to this rule, two New Hampshire lawyers having had occasion to learn from their practice what the law of Canada was, stated it, gave their sources of information, and fortified themselves by reference to the printed laws. It was not an attempt to prove the statutes of Great Britain by a copy of them, but their import by the mouth of witnesses.

In the case at bar, no such course was pursued. It became necessary for the (original) plaintiff to prove, under the plea and brief statement, (*see Record* p. 6.) not only that the company was duly organized under the law of Great Britain, but that under that law it had a cause of action ; and to lay the foundation of the proof of these laws they produce a Mr. Ramsden.

See Record, page 13.

Now if they had asked Mr. Ramsden what the laws of Great Britain were, and allowed him to have refreshed his recollection by reference to the printed statutes, they would have brought themselves within the rules in Hall v. Costello. He didn't undertake at all, of his own knowledge, to give the laws of Great Britian, written or unwritten. He says the plaintiff was a company formed under certain acts. He doesn't, as an expert even, say they had in all respects complied with the requirements of those acts. He then, without any authentication, produces what he says are copies of the acts printed by Her Majesty's printer, with the remark that *they are by law receivable in evidence without further proof*. I suppose by that latter remark he doesn't mean to testify as an expert to this court that they are receivable in evidence *here* without further proof.

That last remark is a solution of his whole testimony. He doesn't pretend as an expert to enlighten this court as to what the law of Great Britain is from his own testimony, but simply to produce certain printed or written transcripts, which he says prove themselves. This would be true in Great Britain and its dependencies, but not in a foreign country.

We adopt the idea, if not the language, of the Lord Chancellor in *Sussex Peerage Case*, 11 *Clark & F.*, 35, when he says the witness may refresh his recollection by

reference to the written law, but the proof of the law is to be from the witness, not the book.

The witness's testimony has not added a word to the copies of the statute. If it is enough to present a portion of the enactment of a foreign country, purportiug to be printed by authority, without any verification, then these statutes have been proven, otherwise not.

Beach v. Workman, 20 *N. H.*, 379, 383.

The general rule as to the proof of foreign laws is, that the law which is written, that is, statute law, must be proved by a copy properly authenticated; and that the unwritten law must be proved by the testimony of experts; that is, by those acquainted with the law.

Ennis v. Smith, 14 *How*, 400.

Pierce v. Indseth, 106 *U. S.*, 546, 551.

It would seem, in the case last cited, the state statute permitted proof very similar to that attempted by plaintiff, but it would have been inadmissible but for such statute; we repeat, no law of New Hampshire justifies it.

Supposing in a trial in New Hampshire a lawyer of Massachusetts was called to prove the corporation law of that commonwealth, and did it by presenting certain detached printed chapters of the statutes of that state, to the court or jury, without further comment than that they were printed by authority and receivable in evidence there without proof, is there any known rule of law which would jnstify such proof?

Exceptions to charge, page 51-52 of record, errors (6-7-8) cover the same objection to proof of the statutes.

Assignment of Errors as to Pleading.

On pages 50-51 of the printed Record, under divisions 1 to 9 inclusive, appear certain exceptions to the declara-

tion in this case. The declaration upon which the trial proceeded is as follows :—

"And also in a further plea of the case for that the said defendant heretofore, to wit, on the second day of December, A. D. 1895, at said London, to wit, at Nashua, in the State of New Hampshire in the United States of America, was further indebted to the said plaintiff in a large sum of money, to wit, eight thousand dollars for a certain call and assessment made by said company in pursuance of its charter and by-laws, at said London, to wit, on the tenth day of July, A. D. 1895, and to be paid on the second day of December, A. D. 1895, upon the defendant's subscription to and ownership of a large number, to wit, one thousand shares at ten pounds sterling each, to wit, fifty dollars each of the capital stock of said company, which subscription had theretofore been made and subscribed in due form by said defendant, to wit, at Nashua, and of the said assessment and call the said defendant had notice at Nashua in the State of New Hampshire, heretofore, to wit, on the second day of December, A. D. 1895, and thereafter, to wit, at said Nashua, on the second day of December, A. D. 1895, in consideration thereof, the defendant then and there promised the plaintiff to pay said sums on demand with interest at the rate of seven per cent. per annum from the time the same became due and payable as aforesaid. Yet though often requested, the defendant has never paid said several sums of money, or any of them, but has neglected and refused so to do."

This action is brought by a foreign company to enforce a foreign contract. The court is presumed to be in absolute ignorance of the laws of Great Britain. The law of Great Britain, since the Declaration of Independence, is the law of a foreign country, and, like any other foreign law, is a matter of fact, which the courts of this country cannot be presumed to he acquainted with, unless it is pleaded and proved.

The rule that the courts of one country cannot take cognizance of the laws of another without *plea* and proof,

has constantly been maintained at law and in equity in England and America.

Bank of North America v. Rindge 154 *Mass.*, 203.
Hancock Nat. Bank v. Ellis, 166 *Mass.*, 414, 419.

Now let us examine the declaration. It avers that the call and assessment were made under the charter and by-laws of this foreign corporation. The charter was a foreign law, and the by-laws a regulation of a foreign company. The burden was on this foreign company to show by its pleadings that its charter authorized this call or assessment, so that upon inspection of the pleadings it should appear that the call was prima facie legal.

This being an action by a foreign corporation under a foreign contract, we claim that there is no presumption of the regularity of the proceedings as in the case of domestic corporations, but everything necessary to give a cause of action must be *pleaded* as well as proved. They should therefore have alleged enough of their organic law, as well as of the regulations to show a prima facie right, at least, to make the call sued on.

We find, then, an averment in the declaration, that the assessment was made at London in pursuance of the *charter and by-laws* of said company. This contract by universal opinion is to be governed by the laws of the place where it was made. It seems to us, that the authority to lay this assessment being derived from foreign laws, and this contract being construed by foreign laws, the rules of good pleading require that the terms of the charter and by-laws giving authority to make the assessment should have been specificably set forth. So, too, if an express promise is necessary to support this action, it should have been averred. If an implied promise will support it, then the laws of the country where the con-

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tract was made, giving a cause of action against a stockholder for an assessment upon an implied promise by reason of his relation to the corporation, should have been alleged.

Necessity of Evidence of an Express Promise Under Laws of New Hampshire.

On page 22 of the Record, it appears that the plaintiff introduced no evidence whatever :—

(1) that the plaintiff was insolvent at the time of making the calls or assessments, or at the time of bringing the suits.

(2) or that the calls were made for the benefit of auditors or payment of debts.

(3) that no promise, express or implied, to pay such assessments, other than that arising from the retention of the certificate of stock by defendant, the articles of association, and rules and regulations referred to in said certificate of stock, and the statutes of Great Britain.

Defendant's exceptions cover the neglect of the plaintiff to prove these several propositions. See pages 51 of Record and divisions 10, 11, 12 and page 57, divisions 27, 28, 29.

Now we submit, that in the absence of any proof that this call was made for the payment of debts or other obligations of the plaintiff corporation, or that the suit was instituted or carried on for the benefit of creditors, there can be no recovery in the absence of an express promise to pay. The cases in the United States courts, which seem to announce a contrary doctrine, are where the action is brought by an assignee of an insolvent corporation to recover an unpaid subscription, and proceed upon

the theory that such a subscription is a trust fund for the payment of corporate debts.

Upton v Trebicock, 91 *U. S.*, 45.

Webster v. Upton in the same volume, page 65, is simply an affirmation of the rule of law, that an assignee in bankruptcy can maintain an action for the unpaid balance due on stock subscription without an express promise.

In those cases no remedy was provided by forfeiture and sale as, in the case at bar.

The case of Chubb v. Upton 95 *U. S.*, 665,

is based entirely upon the last two cases referred to.

These cases differ from the one under consideration, inasmuch as they were suits brought by an assignee in bankruptcy to recover moneys due on unpaid subscriptions, to pay the creditors of the corporation, and it does not appear that their charters or articles of association contained any provision for forfeiture or sale of shares. The charge of Judge Putnam and the exceptions show that there was no evidence in the case to show what the law of Great Britain is upon this subject; whether the remedy by sale and forfeiture must first be resorted to or not. The right to declare a forfeiture of the shares is reserved. Sec. 17-18-19-20, page 25 of Record. This appears in the articles of association which are or may be denominated as the by-laws of the corporation.

The law of England, if we know what it was, would be conclusive upon this subject.

Our contention may be thus succintly stated :—

(1.) That plaintiff offered no evidence as to what the law of Great Britain is to collect calls or assessments, in the absence of an express promise to pay, and without evidence of the necessity of such calls or assessments to

pay debts, when the articles of association provide for a forfeiture of stock.

(2.) There being no evidence as to the law of Great Britain, the court must assume that the law of Great Britain in this behalf is the same as that of New Hampshire.

(3.) The law of New Hampshire declares that no such action can be maintained.

The law of England bears the same relation to the courts of the United States that the laws of one of the United States do to the courts of another state of the Union, and we only suggest this because we desire to make an extract from a state case showing the rule as to burden of proving foreign laws, and the presumptions in the absence of such proof.

"Where a question of the law of another state (foreign country) is in controversy, the party upon whom the burden lies will fail unless evidence is produced to sustain his view ; and statutes and decisions which were not put in evidence at the trial cannot be used the first time at the argument of the case before us for the purpose of proving the law of such state (foreign country)."

"In the absence of anything to show the contrary, there is a presumption that the common law of another state (foreign country) is like that prevailing here."

Kelley v. Kelley, 161 *Mass.*, 111, 114.

"Contracts made in a foreign country, in the absence of evidence of what their legal effect would be in the place in which they were executed, receive the same construction and have the same effect as if they were executed in the place where the action to enforce them is brought."

Whidden v. Seelye, 4 *Maine*, 247,

and many other cases.

Whether an action of assumpsit or debt would lie in Great Britain to enforce this assessment or call, or wheth-

er there must be proof of its necessity, or whether remedy must be had by forfeiture and sale in the first instance, or exclusively, the plaintiff has offered no evidence; Great Britain being an alien country, the burden was on plaintiff to prove its laws.

Liverpool Steam Co. v. Phœnix Ins. Co., 129 *U. S.* 397, 445.

Pierce v. Indseth, 106 *U. S.* 546, 551.

What is the law of New Hampshire in this behalf? The cases declaring the law of New Hampshire are long continued and uniform.

The rule is thus stated by Judge Woodbury, for many years a justice of the supreme court of the United States, as a principle of common law:

"It is well settled, that when an act of incorporation gives no express remedy against a member for assessments, he is liable to no action for them by virtue of his membership."

"The corporation can enforce payment only by a sale of his shares; and if action can be sustained against him it must be founded on a distinct ~~special~~ private promise to pay the sums assessed."

Franklin Glass Co. v. Alexander, 2 *N. H.*, 381.

This case has been affirmed or approved in

Railroad v. Johnson, 30 *N. H.*, 390.

Company v. Burlingame, 67 *N. H.*, 301.

Shattuck v. Robbins, 68 *N. H*, 565.

But it is said that this court is not bound to follow the decisions of New Hampshire, the question involving principles of general law. No reason appears why this court should not follow the law as administered in New Hampshire, and there are potent reasons why it should.

In the first place it is hardly a question of general jurisprudence. It is rather local than otherwise, and not one

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arising from, or concerning, the usages of commerce. None of the reasons urged in *Railroad Co. v. Bank*, 102 *U. S.* 14, 58, for a uniformity of decisions in transactions of a commercial character apply here.

But there are no Federal decisions contravening the New Hampshire cases, and if none, the Federal courts will learn, even in matters of general jurisprudence, with the views of the state courts.

Burgess v. Seligman, 107 *U. S.*, 20, 34.

The recent case of *Mandell v. Swan Land & Cattle Co.*, 154, *Ill.* 177, deals somewhat with this subject, but we have been unable to derive from it any very valuable conclusions.

HAS THERE BEEN ANY EXPRESS PROMISE TO PAY?

The defendant, in support of its contention, relies upon the following clause (Sec. 16) in the general act under which the company was organized.

"All monies payable by any member to the company, in pursuance of the conditions and regulations of the company, shall be deemed to be a debt due from such member to the company."

Record p. 15.

It is difficult to extract from this clause a promise to pay. Undoubtedly the assessment, if properly laid, would create a debt, and there may be an implied promise from the character of the obligation to pay it, as there is on the part of anyone to pay his debts, but that does not answer the requirements of the law as administered in New Hampshire. It must be an express promise to pay, to render the stockholder liable under the decided cases of that state.

As the plaintiff has not given us the benefit of the law

of England in this behalf, we must assume it to be the same as the New Hampshire law.

In the recent case of *Anglo-American Company v. Dyer* in Massachusetts 64 N. E. 416, the court assume that this clause creates an implied promise, but not a direct one. The court in that case was not dealing with the law of New Hampshire as declared by its highest tribunal.

EXCEPTION TO REFUSAL TO DIRECT VERDICT FOR WANT OF EVIDENCE.

The action proceeded before a jury, but at the close of the testimony a verdict was directed for the plaintiff. To this direction exception was taken, as appears upon page 50 of the Record.

It is said that the Record does not say categorically, that the evidence appearing there was *all* the evidence in the case, and hence this court will not determine the question of sufficiency of evidence.

This defence cannot prevail, because the record does show that, upon what we regard as essential propositions, all the evidence, or want of evidence, bearing upon them is recited. Thus on pages 22 and 23 of the printed Record it appears that the statutes, memorandum and articles of association, certificate of stock, and Mr. Ramsden's testimony, constitute all the evidence bearing upon plaintiff's incorporation and organization.

Moreover, on page 11 of the Record, appears the recital that the plaintiff thereupon proceeded to "introduce the following evidence." The fair inference from this statement is, that the evidence thereafter recited was all that the plaintiff did introduce.

U. S. v. Copper Queen Mining Co., 185 *U. S.* 495.

But whatever view the court may take of this proposition. this case does not stand as one tried by a jury with a general verdict. The presiding justice has directed a verdict, and given his reasons for the "faith that is in him." He has stated the facts which he claims in his opinion were proven, and upon which he bases his direction for a verdict.

We say they are insufficient to sustain a verdict. As we understand them, the facts are :—

(1.) The production of the certificate of stock by defendant upon request, as evidence that defendant is a stock holder.

Record p. 35.

(2). The testimony of Ramsden.

(3). Statutes of Great Britain.

(4). Posting notice of call, and mailing same.

(5). Habitat of plaintiff corporation.

(6), Decisions of New Hampshire.

(7). Presumption of obligation to pay from delivery and acceptance of stock.

(8). No proof whether corporation has ceased to do business, or is in active operation, or owed debts, or whether call is necessary to pay debentures. *Record p.* 40,

(9). Extract from Statutes of Great Britain, Sec. 16.

(10), Form of action.

Now we submit that the burden was on the plaintiff, not the defendant, to prove the regularity and necessity of these calls or assessments, and there was no evidence, as appears by the charge of the court, upon these topics.

The law in this behalf, we apprehend, stands differently, in the case of a foreign or international, and a domestic corporation. It is seemingly settled that there is a presumption that the acts of a domestic corporation are regular and legal, and bind the stockholder. Of course, it is a

work of supererogation to call the attention of this court to this statement of the law.

We have been unable to find any case of the Supreme Court where this question has been directly raised. There may be such, but that we have not found them, is all that we can say. Reasoning, then, from general principles and analogy, we come to the conclusion that the regularity of the proceedings of a corporation of another country must be proven.

There was an entire absence of evidence as to whether such presumption prevails in the case of an alien corporation proceeding to enforce an assessment, or call, made under the laws of another country, in the courts of England. Nor was there any evidence even as to whether such presumption prevails there, under its own companies act, although if there was, it might not affect our consideration of this matter.

There seems to be a principle of reciprocity attending the administration of the laws of an alien country, which would, as a matter of international comity, induce our country to give the same weight to these acts, that they give to ours.

Hilton v. Guyot, 159 U. S. 113.

It seems to us that unaided by the presumption of regularity as to the manner and purpose of this assessment, the plaintiff has not sustained his case upon the facts found by the presiding Judge. If the presumption that prevails in behalf of the preceedings of a domestic corporation does not prevail, the burden certainly was on the plaintiff to prove that the assessments were made for some lawful purpose. The charge of his Honor, Judge Putnam, as well as the exceptions show that no such proof was made.

In Mandel v. Swan Land & Cattle Co., 154 *Ill.* 177, 40 *N. E.* 462, the court distinguishes between acts done under the organic law, and acts done under the by-laws, of an alien corporation, as to their effect upon a stockholder. The articles of association appearing on pages 19 and 20 of the Record are the by-laws of the company. It is these articles that disclose the authority of this company to order assessments or calls.

Sec. 9, Record, p. 20.

Just why this authority was given, by subsequent resolution, and amendment, does not appear. Very likely it was the purpose of this corporation, when it placed its stock in the American market, to limit the amount of its calls.

EXCEPTIONS TO CHARGE TO JURY BY JUDGE PUTNAM.

Many of these exceptions are but a reiteration of these already discussed, but we desire to call the attention of this court to several others, which we think may state the law incompletely or inaccurately.

It is sometimes difficult, as said by the court in *Hoadley v. Northern Transportation Co.*, 115 *Mass.*, 304, 307, to determine whether the rule sought to be applied touches the remedy or the contract. We find some difficulty in determining the question in this case, as to whether the collecting of this assessment, by sale and forfeiture, or proceeding at law, applies to the contract or the remedy. If to the remedy, then surely the law of New Hampshire must prevail.

Now on Page 53 of the Record it appears that Judge Putnam enunciated a correct principle of law when he said that he must be governed by the laws of Great

Britain so far as they are shown in the case, and that so far as they were not shown, he was bound to assume they were the same as the laws of New Hampshire. So far, there can be no exception, but we did and do except to his further statement and application of it, that with reference to a question of general character he was not bound by the decisions of the court of New Hampshire, excepting so far as they commended themselves to his judgment.

The language of this charge may in a general way be correct, but the application of it, as appears on page 55, in which he states that the doctrine of the New Hampshire cases is contrary to the ordinary principle of law, and hence does not govern this case, we think is erroneous.

What are questions of general law it is pretty difficult to determine. Questions concerning usages of commence are supposed to be, but it does not occur to us, that a question as to the mode of enforcing an assessment under the laws of a state of the Union where the proceeding is pending, is one of general law, or general interest. It is special, not general.

The instruction or statement, on page 55 of the Record, that the delivery and receipt of shares of stock implies a promise to pay a call or assessment, is diametrically opposed to the law of New Hampshire.

Railroad v. Johnson, 30 *N. H.*, 390.

Company v. Burlingame, 67 *N. H.*, 301.

Shattuck v. Robbins, 68 *N. H.*, 565.

On page 56 of the Record, Judge Putnam, in discussing the form of action, said: "If this case was at common law and based on common law principles, there would be no question that this is the right form of action. Therefore, inasmuch as in my view this suit can be maintained on

common law principles, and independently of the statutes of Great Britain, &c." For further illustration of this remark, it is only fair to call attention to its connection with the rest of the charge on page 42 of the Record.

It appears in the declaration (Record, p. 5,) that this assessment was made in pursuance of the company's charter and by-laws. This was a material allegation. Judge Putnam (Record, p. 42,) predicates the right of plaintiff to recover on the words of the statute, that "all monies payable by any member of the company to the company in pursuance of the conditions and regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt."

Record, p. 15.

It was error, therefore, it seems to us, to hold that this action could be maintained on common law principles, and independently of the statutes. At all events, if it could, the plaintiff did not attempt it, but relied on the statutes as averred.

The common law rule of pleading prevails in New Hampshire, excepting so far as modified by the statute allowing a defendant to file a brief statement of defence under the general issue, instead of a special plea. We have the law of England that this is a specialty debt, in the place governing this contract. By the law of New Hampshire no action can be maintained without a special promise to pay this assessment, so the law of England must prevail in this behalf, if there can be any recovery at all. The remedy to enforce a specialty debt, wherever the common law rules of pleading prevail, is debt.

On page 56 of the Record, it appears that the court said:

"It is not really maintained by the defendant that

there is any evidence here that the particular call or assessment in issue has been paid. And it is of no sort of consequence, so far as this case is concerned, what happened about other calls or assessments. If the defendant had paid this call, it is for the defendant to show it, and to overcome, by some evidence, the implication arising from what appears on the certificate of stock, that a large percentage of the par value of this stock has not been paid. The burden is upon the defendant to show that this particular assessment in issue has been paid."

To this ruling exception was duly taken (Record, p. 56.)

Of like tenor with this suggestion, is the ruling of the court, appearing on page 24 of the Record, admitting a part of the record of registry of members, accompanied by the remark that if the entire record were here, he should not allow anything else to be read.

We assume the law to be that when the stockholders are asked to pay the balance of the subscription upon call or assessment, there is an implied condition that the call shall be made upon all the shareholders alike. In this view of the law, the general statement of the Circuit Judge, and the admission of the partial record, were errors.

The rest of the record showing a registry of the other stockholders, and their status with the Company, would have had a tendency by comparison to prove (if the fact was so) the irregularity of this call, and to have enabled the defendant to have laid some foundation for a further investigation of the fact, whether this call was general, or only special. We suppose there can be no doubt that if this stock was subject to a call for one pound each from time to time, at the discretion of the directors, and an assessment of two pounds each was laid upon the British stockholders only, and five pounds each on the American stockholders, no suit would be entertained for a recovery of such unequal assessment, against the latter.

The partial enquiry to which the evidence was limited, subject to defendant's exception, gave no opportunity to investigate the fairness of the calls in this particular.

We think that all the propositions that we have briefly discussed are fairly covered by our bill of exceptions. Of course they were taken and stated hastily during the progress of the trial, and upon more careful consideration might be expressed in more exact terms, but by fair intendment they state the objections we are here urging.

It is said that the remarks of the learned judge in directing a verdict were merely a personal explanation of his views of the law and facts that led him to take that course, and not subject to exception. If he has directed a verdict upon an erroneous view of the law and facts, it is difficult to see upon proper exception why we cannot claim relief from his errors. If not, the defendant would seem to be remediless as against errors which were the very basis of a wrong verdict.

The general proposition as to the duty of an alien corporation to establish the regularity of its organization and corporate acts, without the aid of legal presumptions, as a condition precedent to the maintenance of an action of this character, has been stated with great clearness and vigor of language by Judge Aldrich in his dissenting opinion. It is almost invidious to select any passages from this able opinion for the consideration of the court. We cannot repeat,—we have not the ability to express our views of the insufficiency of evidence in the case to justify a verdict, so ably and satisfactorily as they have been stated by this able jurist.

We can only commend them to the consideration of this court.

J. S. H. FRINK,
A. T. BATCHELDER,